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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6027

RAYMOND WOOD, EDNA ALLEN, and
JAMES TANTE,

Petitioners,

vs.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

GEORGIA COURT OF APPEALS

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Petitioners pray that a Writ of Certiorari issue to to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on June 5, 1979.

OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 150 Ga. App. 582, 258 S.E. 2d 171 (1979), and is set forth in Appendix "A".

JURISDICTION

The Judgement of the Georgia Court of Appeals was entered on June 5, 1979. An Application for rehearing was timely filed and denied on July 6, 1979. Copy of said denial is set forth in Appendix "B" hereto. Thereafter, the Supreme Court of Georgia denied a timely filed Petition for Writ of Certiorari on September 4, 1979. Copy of said denial is set for th herein in Appendix "C". Mr. Justice Powell granted an extension of time to and including February 1, 1980 within which to file this Petition. The Court's jurisdiction is invoked under Title 28, United States Code §1257 (3).

QUESTIONS PRESENTED

Once a State Court has determined that probation is the appropriate punishment for a particular offender, and also imposes a fine to be paid on installments during the probationary period, may it, consistently with the Equal Protection and Due Process clauses of the Fourteenth Amendment, revoke the probation of the offender for failure to pay the installments as directed where the evidence established that the offender was indigent and that the offender was not negligent in any manner, and did not deliberately disburse or dissipate monies that resulted in his inability to pay?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the United States Constitution as well as Georgia Code Annotated 27-2901, are set forth in Appendix "D" hereto.

STATEMENT OF THE CASE

Petitioners were placed on probation after being convicted of distribution of obscene materials. Their cases are reported at 144 Ga. App. 236, 240 S.E. 2d.743 (1977), and 144 Ga. App. 233, 240 S.E. 2d. 754 (1977). Wood received a ten thousand ($10,000.00) dollar fine and twelve (12) months on probation on each of two (2) counts to run consecutively. Tante and Allen each received a five thousand ($5,000.00) dollar fine and twelve (12) months on probation.

The remittiturs were made the judgment of the trial court on October 23, 1978. (R-20, 21, 22). The trial judge in each probation order, as a condition required each appellant to pay five hundred ($500.00) dollars per month until the fine was paid. (R-23, 24, 25).

Thereafter, on January 12, 1979, or approximately 2 1/2 months after being placed on probation, a petition for revocation of probation was filed against each Petitioner and the sole ground for revoking the probation was that the Petitioner failed to pay as directed. (R-26, 27, 28.)

A hearing was held on January 26, 1979. Jacqueline L. Tomlin, Edna Allen's probation officer, testified that the Petitioner was on unemployment compensation, and that Allen had not paid the $500.00 per month and had no idea how she would raise the fine money. (T-4-6). Upon questioning by her Counsel, Allen testified that she receives $64.00 per week or about $250.00 per month, and has no other assets or sources of income. (T-7) Allen is presently having eye trouble, is 54 years of age, and has been turned down for employment. (T-8, 9, 24, 25) She borrowed money to pay for her eye glasses, and has no money left over, after paying expenses, to pay on her fine. (T-9-11)

Gene Odum, James Tante' probation officer, testified that Tante had complied with the conditions of probation except paying the $500.00 per month on the fine. Tante told Odum that his employer was supposed to pay the fine, and that he was on a very tight budget. (T-23, 33) Tante testified he worked for the State of Georgia as a correctional officer. (T-33) His gross income is $540.00 per month, and he has no other property or income. (T-35) His net pay is $516.00 per month, and he had nothing left over in November and December to pay on the fine. (T-37).

Tante is 60 years of age, and was unemployed for eight months, and was on unemployment before he obtained his present job. (T-38-40)

Dixon E. Nash, Raymond Wood's probation officer, testified that Wood had not paid the fine as directed. Wood had been terminated from his prior employment, and just started a new job. His gross income is $120.00 per week at his new job. (T-53). Wood's net pay was about $155.00 after deductions on his old job, and he had no money left over to pay his fine. Also, he is the sole support of his wife and three children. (T-54, 55)

The Court issued an order revoking the probation of all three Petitioners on the sole ground that each Petitioner violated the terms of probation by not paying the fine as directed, being $500.00 per month or $1500.00 for 3 months. (R-29-34) (R-37,38,39).

REASON FOR GRANTING THE WRIT

I.

This Case Presents For Review An Issue Expressly Reserved By This Court In Tate vs. Short, 401 U.S. 395 (1971) and Williams vs. Illinois, 399 U.S. 235 (1970) - The Imprisonment of The Defendant For Failure To Pay A Fine On Installments Due To His Indigency After Being Placed On Probation.

In Tate vs. Short, 401 U.S. 395, 400 (1971), this Court stated that"

"...Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case."

In Williams vs. Illinois, 399 U.S. 235, 243 (1970), this court stated that:

"... We have no occasion to reach the question whether a State is precluded in any other circumstances from holding an indigent accountable for a fine by use of a penal sanction..."

This case appears to be the concrete case mentioned in Tate vs. Short, supra.

The Georgia Court of Appeals in Wood, et al. vs. State, supra, held that:

"At the revocation hearing, it was established that none of the appellants had the financial resources to make the payments..."

In Tate vs. Short, supra, this Court struck a sentence that converted a fine into imprisonment due to the indigency of the defendant. Similarly in Williams vs. Illinois, supra, it was held that the term of imprisonment for an offense could not be extended beyond the maximum period fixed by law resulting directly from an involuntary nonpayment of a fine or court costs.

The fundamental question boils down to whether the sort of sentence an offender must serve may ever explicitly turn solely upon the amount of money he has. Griffin vs. Illinois, 351 U.S. 12, 19 (1956).

It is now clear that the conditional liberty of an offender who has been awarded probation is part of the liberty

directly secured by the Fourteenth Amendment. Morrisey vs. Brewer, 408 U.S. 471 (1972); Gagnon vs. Scarpelli, 411 U.S. 617 (1973).

The evidence showed that the installment payment of $500.00 per month on the fine was more than Wood and Allen made in a month. Tante's net pay was $516.00 a month. On these facts, the alternative offered the petitioners was, in effect, a nullity.

There is no "inverse discrimination" that is mentioned in Williams vs. Illinois, supra, and Tate vs. Short, supra, since the petitioners were serving their sentence on probation. They were reporting to their probation officers and were complying with the terms and conditions of their probation. They were, in essence, serving their sentence.

It should be pointed out that the fine is a judgment against the defendant, and the State can always levy against any property the defendant may own at a later time. Also, the State may file a garnishment against the salary of the defendant in order to collect the fine. Therefore, the petitioners are subject to paying the fine at a later time, and even after the probation period is over.

II.

There Is A Conflict Between the Federal Courts And The State Courts.

Recently in U.S. vs. Boswell, 605 F. 2d. 171, (1979, 5th Cir.), the Court held that a revocation of probation was erroneous if the defendant did not have the resources available, had no way to acquire them, and was not negligent or deliberate in allowing funds that he had to be disbursed or dissipated in a manner that resulted in his inability to pay.

Similarly in U.S. vs. Taylor, 321 F. 2d. 339 (1963, 4th Cir.), the court held that if the defendant was too poor to pay the fines, was not to blame for it, and was sincere in trying to pay the fines, his probation should not be revoked.

The applicable law is stated in U.S. vs. Savage, 440 F. 2d 1237, 1239 (1971, 5th Cir.) that a defandant:

"...can not be held to be in violation of the condition (of his parole) unless he is clearly at fault." See also Hensley vs. U.S., 257 F. 2d 681 (1958, 5th Cir.).

The above cited federal cases clearly reflect that in order to revoke the probation of the defendant, he must be negligent in not paying the installment payments, or willfully refuses to pay the fine.

Georgia refuses to follow the Fourth and Fifth Circuits and holds that probation can be revoked solely because of the indigency of the defendant.

This conflict should be resolved and this case is the proper case for this court to provide a uniform rule of law for the United States.

The Petitioners have not been negligent, and have not surrendered a fair opportunity to make the required installment payments.

To imprison the Petitioners when in the same circumstances a person of means would remain free constitutes a denial of the equal protection of the law. The confinement results from failure to pay a fine on installments being directly converted into imprisonment. The defendant who is involuntarily unable to pay is subjected to imprisonment solely because of his indigency.

The trial court has determined that the Petitioners need not be confined for their crimes and that the State's penal interests would be met by a fine to be paid in installments and probation. (See Ga. Code Ann. §27-2901) This is an individualized sentence and the Petitioners certainly have no quarrel with the court's essential judgment. But to revoke the probation due to their indigency is irrational, unnecassary, and impermissibly barred them from the benefits which the court adjudged them worthy of. This violates due process of law.

The State must accomodate their indigency and permit them the same escape from confinement open to a defendant of means under the same sentence. It cannot offer probation only to those who can pay.

Whether a person can pay a fine on installments has no apparent relationship to punishment or to rehabilitation.

Wood was a mere clerk in a bookstore; Allen was a mere ticket taker in a theater; and Tant was a mere projectionist in a theater. The imposition of substantial fines on this type of person can only result in the revoking of the probation sooner or later. The trial court was fully aware of the financial situation of the Petitioners when he imposed the sentences.

If the probation sentence can be revoked in this case, then the probation sentence was illusory and amounted to the trial judge giving the three Petitioners a test of liberty for three (3) months, but in effect was really giving them a sentence to serve in prison. Under the holdings of Morrisey vs. Brewer, supra, the State court is required to keep the Petitioners on probation as they were clealy not at fault in failing to comply with the terms of probation.

Since we have a national constitution , the application of the constitution should be uniform in both the state and federal courts.

CONCLUSION

The Georgia Court of Appeals relied on Hunter vs. Dean, 240 Ga. 214, 239 S.E. 2d 791 (1977) in upholding the trial court's decision. Hunter vs. Dean is based on Barnett vs. Hopper, 234 Ga. 692, 217 S.E. 2d 208 (1975). Subsequently that judgment was reversed in Barnett vs. Hopper, 548 F. 2d 550 (1977, 5th Cir.). This Court granted certiorari in Hopper vs. Barnett, ___ U.S.___, 58 L.Ed. 2d 701 (Dec. 11, 1978) and vacated the judgment of the Fifty Circuit on the grounds of mootness. In both Dean and Barnett, the sentence required payment of a fine in a lump sum before the defendant could be placed on probation. It therefore appears that a Writ of Certiorari should be granted based on this Court vacating the Fifth Circuit's ruling in Hopper vs. Barnett, and Hunter vs. Dean, supra, being based on Barnett vs. Hopper, 234 Ga. 692, 217 S.E. 2d 208 (1975).

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JUN 5 1979

Appendix "A"

57867. WOOD (RAYMOND) et al. v. THE STATE. Ba-102

BANKE, Judge.

Each of the three appellants was convicted of distributing obscene materials and each was sentenced to pay a fine and to serve 12 months on probation. Following the affirmance of these convictions on appeal, the trial court entered probation orders requiring each appellant to make payments of $500 per month towards payment of his or her fine as a condition of probation. Thereafter, each appellant's probation was revoked for failure to make the $500 payments as directed.

At the revocation hearing, it was established that none of the appellants had the financial resources to make the payments. On appeal, the appellants contend that to revoke their probation under these circumstances amounts to imprisoning them for their indigency, in violation of their rights under the Fourteenth Amendment of the United States Constitution. They further contend that the trial court was without authority under Georgia law to require payment of the fines as a condition of probation. Held:

1. In Hunter v. Dean, 240 Ga. 214 (239 SE2d 791) (1977), a requirement that a defendant pay a fine as a condition precedent to serving a sentence on probation was

held not to violate the equal protection or due process provisions of the United States Constitution, even "when the defendant is indigent and unable to make immediate payment of the fine." See generally Code Ann. § 27-2709. The appellants contend that while this may be the law where payment of the fine is required as a condition precedent to probation, the situation is different where payment of the fine is required as a condition of the probation itself. We are unable to accord this delicate distinction the weight which the appellants seek to give it. In our view, Hunter controls this case and requires the affirmance of the trial court's ruling.

2. The fact that Code Ann. 27-2711 does not list payment of a validly imposed fine as one of the permissible conditions of probation does not require a different result. It is well settled that the conditions enumerated in that section are not exclusive, but the court may impose other requirements not specifically listed therein. See George v. State, 99 Ga. App. 892, 893 (109 SE2d 883) (1959); Gay v. State, 101 Ga. App. 225 (1) (113 SE2d 223) (1960).

Judgment affirmed. McMurray, P. J., and Underwood, J., concur.

Appendix "B"

Court of Appeals of the State of Georgia

ATLANTA, July 6, 1979

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

57867. Raymond Wood et al. v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

CLERK'S OFFICE, ATLANTA JUL -6 1979

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Morgan Thomas

CLERK.

Appendix "C"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta Sept 4, 1979

Dear Sir:

Case No. 35427. Raymond, Edna Allen & James Wood et al v. The State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur, except Nell, J., who dissents

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk